



# Department of Law

## Monthly Report

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### Collections & Support

#### PERSONNEL CHANGES

In July 2001, the Collections Unit hired Rosalie Nizich from the Juneau office as its new litigation assistant. Rosalie has been finishing up her Juneau case load and soon will be working full time collecting civil judgments owed to the State of Alaska and APOC and OSHA penalties.

#### FY01 COLLECTIONS MORE THAN \$1 MILLION OVER PRIOR YEAR

On the criminal side, the unit completed the 2001 PFD attachment. The unit matched with PFD applications on over 35,000 judgments with a value of \$9.6 million. The unit also completed the fiscal year end reporting for the Department of Corrections, the court system, APOC, and OSHA. It was a record year for the Collections Unit, collecting \$3,993,590.82 for the state in FY01, up from \$2,769,653.68 in FY00.

#### SUPPORT ORDER FINALLY RESOLVES AMOUNT OWED

In the *Knott* case, AAG Connie Carson obtained a child support order for a sum certain after lengthy litigation. In December 1996, the court ordered that support be paid pursuant to Civil Rule 90.3, but failed to set

an amount. It was not until CSED began enforcing the case that a specific support amount was requested. Although the 1996 order provided for shared custody, the parents agreed that they had exercised shared custody only through December 1997, after which the mother had primary custody. Thus, through the course of the litigation, CSED provided the court with several support calculations for different times and custody arrangements. In the meantime, without a specific support amount, CSED could not collect support for the custodial parent. Eventually, AAG Carson requested an interim support order. The court issued an order on July 5, 2001, finding that *Turinsky v. Long* prohibited a retroactive finding of primary custody back to January 1, 1998, but that the mother had given sufficient notice of her intent to request child support based on primary custody as of November 1, 2000. The court then revised the figures and the timeframes and issued the order.

## Commercial

### STATE MARINE PILOT APPEALS REVOCATION OF HIS LICENSE

The February monthly report summarized a long-running license discipline action by the state Board of Marine Pilots. The board summarily suspended David Renwick's state marine pilot license after he abandoned a vessel he was piloting near Dutch Harbor in March 1994. After two intermediate trips to the state Supreme Court, the board at its most recent meeting voted to permanently revoke the pilot's license. We thought that might be the end of the matter. During July, however, Renwick's attorney filed an appeal of the board's action to state superior court. It looks like a third round of appellate briefing in this case for AAG Gayle Horetski, who has handled the case throughout its long life.

### NURSE AIDE CERTIFICATE REVOKED IN JOINT AGENCY ACTION

In 1998 the state legislature established standards for the certification of nurse aides. The law authorizes the state Board of Nursing to revoke the certification of any nurse aide found to have abused or neglected a patient. If the nurse aide works in a facility receiving Medicare or Medicaid funding, however, federal law requires that the evaluation of the nurse aide's conduct must be made by the state Department of Health and Social Services (DH&SS). To comply with federal law, state law provides that DH&SS will conduct an administrative hearing under the APA. If the DH&SS commissioner concludes that a nurse aide has abused or neglected a facility patient, that finding is forwarded to the Nursing Board, which is required to revoke the aide's certificate and record the action in the state registry of nurse aides.

This "joint agency" system was used for the first time in a case that arose in the long-term care unit of the Petersburg Medical Center. On March 7, 2000, certified nurse aide Ricarda Owens was caring for an 81-year-old man who suffers from dementia. While Owens was attempting to transfer the patient from bed to a chair, he grabbed her hair and swung out at her with his arm. In response, Owens struck the patient several times on the left side of his face, breaking and bruising his skin. She said that she was tired of being hit by the patient, and "maybe now he'll stop." The assault was witnessed by another nurse aide. Although Owens begged her not to, the other aide reported the assault to her supervisors at the hospital. Owens was interviewed, and admitted that she had struck the patient. She was immediately fired.

DH&SS filed an accusation against Owens, and an administrative hearing was held before a hearing officer. Fifteen witnesses testified, including the investigating police

officer, the treating physician, members of the patient's family, and several nurses and nurse aides. When Owens testified, she denied that she had struck the patient or told anyone that she had. The hearing officer found that the abuse occurred, and issued a proposed decision recommending the revocation of the nurse aide's certificate. The DH&SS commissioner adopted the proposed decision, and notified the Board of Nursing of her action. At its most recent meeting, the board voted to revoke Owens' certificate and record the action in the state nurse aide registry. AAG Gayle Horetski assisted both agencies in procedural matters, and represented DH&SS at the administrative hearing.

#### **PERMANENT FUND DIVIDEND ELIGIBILITY REQUIREMENT UPHOLD**

The Alaska Supreme Court opinion affirmed the denial of Mr. Anderson's application from a 1997 permanent fund dividend. Mr. Anderson is a member of the U.S. Coast Guard who left Alaska in 1991. He continued to receive permanent fund dividends after his departure under a legal standard that makes servicemen eligible for the dividends as long as they maintain their Alaskan residency. After five years of absence from the state, they are presumed to have lost their Alaskan residency. In 1997, Mr. Anderson had been absent from the state for more than five years and was therefore presumed to have lost his Alaskan residency. The Permanent Fund Division denied his application because he failed to overcome the presumption. Mr. Anderson unsuccessfully appealed the denial to the superior court and then to the Alaska Supreme Court. AAG Dan Branch represented the state in the case.

The third case, mentioned in the April monthly report, involved a certified nurse aide who had failed to report criminal convictions for which she had received suspended impositions of sentence. The hearing officer

ruled that the applicant, Margaret Schwantes, should have reported the convictions, and recommended that the board impose a fine and a public reprimand. The board accepted the hearing officer's recommendation.

#### **Fair Business Practices**

#### **INSURANCE COMPANY LIQUIDATION PROCEEDS**

AAG Signe Andersen continued to represent the director of the Division of Insurance in his capacity as statutory receiver in a liquidation proceeding in Anchorage superior court involving a defunct domestic life insurance company. Andersen helped prepare and file for court approval the Receiver's Second Report on Claims and Request for Partial Distribution. This filing involved review and approval of 96 claims under a substantial evidence standard. The request for partial distribution related to approved policyholder claims that have priority of payment under the liquidation statutes after administrative expenses of the liquidation proceeding. The court issued an order approving the report and request for partial distribution. The former principal shareholder of the company filed a motion to reconsider the court's order, which is now briefed and pending before the court.

#### **PRIVACY REGULATIONS PROJECT UNDERWAY**

AAG Nick Atwood has been working with the Division of Insurance (DOI) on the promulgation of regulations aimed at setting privacy standards that an insurer and its representatives must meet in order to disclose personal information about a consumer. Last session's HB 184, signed into law by the governor, made substantial amendments to the state's insurance law. The amendments were, in large part, responsive to a federal law - the Gramm Leach Bliley Act ("GLBA"). GLBA, among other things, removed legal barriers to the

affiliation of banks, insurance companies, and securities firms. While it is hoped that these new affiliations will benefit consumers, it is also the case that these affiliates will have an unprecedented amount of personal financial and health information about the consumers with whom they do business. HB 184 charges the director of the DOI with establishing regulations that set standards for the circumstances under which such information may be disclosed. Privacy issues were the most hotly debated of any during the hearings on HB 184. While proposed regulations have not been officially noticed for comment, the division has published a "rough-draft" based on model provisions adopted by the National Association of Insurance Commissioners and the National Conference of Insurance Legislators and has held statewide public meetings soliciting comments on the draft.

#### **REGULATORY COMMISSION OF ALASKA**

AAG Ron Zobel filed a post hearing brief on behalf of the Public Advocacy Section (PAS) of the Regulatory Commission of Alaska in a proceeding before the commission on TransAlaska Pipeline intrastate rates for 1997-2000. This proceeding is primarily about the cost of transportation to Alaska's in-state refineries. The proceeding began with a protest filed by Tesoro.

AAG Zobel also is representing the PAS in a couple of major rate proceedings involving Chugach Electric Association and Alaska Communication System and in a proceeding involving the price of gas from ML&P's Beluga gas field purchased in 1996. He has prepared for administrative hearings in each of these cases, which has included preparation and filing of prefiled testimony, expert witness preparation, motion practice, and discovery.

## **Governmental Affairs**

### **DISMISSAL RECOMMENDED IN FEDERAL COURT EMPLOYMENT DISCRIMINATION CASE**

United States District Court Magistrate Judge John Roberts has recommended dismissal of a former CSED employee's race-discrimination claims against 17 individuals that the former employee named as defendants. Magistrate Judge Roberts agreed with AAG Dave Jones' argument that Alaska's Human Rights Act does not authorize employment-discrimination claims against individual supervisors or co-workers. We are awaiting Judge Singleton's action on Magistrate Judge Roberts' recommendation.

### **DISMISSAL OF DISCRIMINATION AND RETALIATION CLAIMS SOUGHT**

The state has asked Juneau Superior Court Judge Larry Weeks to dismiss Lee Gaffey's claims against her female supervisor for alleged sex discrimination and retaliation because of Ms. Gaffey's union activities. In addition to arguing that Alaska's Human Rights Act does not authorize employment-discrimination claims against individual supervisors, the state points out that, contrary to the allegations in Ms. Gaffey's complaint, the Human Rights Act does not address retaliation for union activities.

### **OFFICIAL IMMUNITY MOTION FILED**

Anchorage Governmental Affairs has filed a motion asking Anchorage Superior Court Judge Rene Gonzalez to dismiss a former DEC employee's claims against Commissioner Michele Brown and a human resource manager because they are entitled to official immunity. The plaintiff, Steven Eng, claims that the individual defendants interfered with his contractual rights,

retaliated against him because of whistleblowing, and denied him his rights to free speech and due process in connection with the withdrawal of a job offer that he received. AAG Dave Jones has asked Judge Gonzalez to rule that the individual defendants are entitled to immunity from these claims.

#### **STATE DEFEATS PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT**

The state successfully opposed the plaintiffs' motion for relief from judgment in the case *Ross, RPA, et. al v. SOA, Div. of Elections*. The plaintiffs moved for relief from the judgment dismissing their case, and various orders entered against them, by the federal district court in 1998. In the *Ross* case the plaintiffs had unsuccessfully attempted to assert various challenges to Alaska's blanket primary election law. In their motion for relief plaintiffs claimed that they were entitled to relief from judgment based upon the U.S. Supreme Court's decision on the blanket primary in *California Democratic Party v. Jones*, 530 P.2d 567 (2000). Judge H. Russel Holland denied plaintiffs' motion on July 12, 2001, finding no basis for exercising the district court's discretion under FRCP 60(b)(5) to allow relief from judgment because there was no order having lasting prospective application as to which the plaintiffs showed entitlement to relief. The judge found that there was no order of the district court inconsistent with the Court's decision in *Jones*. The judge also found that plaintiffs were not entitled to relief from judgment under FRCP 60(b)(6) because post-judgment changes in decisional law do not warrant relief from a judgment that does not have prospective application. Plaintiffs have filed an appeal of Judge Holland's decision to the 9th Circuit Court of Appeals. This matter was handled by AAG Sarah Felix.

#### **ADMINISTRATIVE DECISION UPHELD**

After a hotly contested, two-day hearing (with day one running until 9:30 p.m.), the Public Employees' Retirement Board (PERB) upheld the decision of the administrator of the Public Employees' Retirement System to deny occupational disability benefits to a former state employee in Juneau. The employee claimed that she was totally and presumably permanently disabled because of migraine headaches. However, the PERB accepted the arguments of the administrator, represented by AAG John Gaguine, that the employee had failed to prove disability because 1) the employee declined to try to work in a new office that her employer had offered her in an attempt to accommodate her condition, and 2) the employee and her doctor had not attempted several lines of treatment to ameliorate her headaches. The administrator was greatly assisted by the excellent testimony of an Anchorage neurologist whom the administrator had retained as an expert consultant. The period for an appeal of this decision to the superior court has not yet run.

#### **STATE PREVAILS IN ARBITRATION**

The state recently prevailed in an arbitration hearing involving the termination of an employee who had circulated a cartoon within the agency that suggested sexually inappropriate behavior between management employees. The employee had argued that she was only attempting to start a dialogue with the commissioner by gaining his attention (the cartoon was deposited in the commissioner's mailbox) with a communicative method that would generate shock, followed by serious attention to other internal problems that were being neglected. The cartoon had no basis in fact and, as the arbitrator saw it, was itself a form of sexual harassment against management employees that the offending employee simply did not like. At the department's request, the

attorney general's office through AAG Pat Gullufsen defended the termination decision at the arbitration hearing.

## Human Services

### **MEDICAID DENIAL UPHELD**

On July 26, 2001, AAG Dawn Carman received a favorable ruling for the Department of Health and Social Services from the Anchorage Superior Court in an administrative appeal concerning the denial of adult dental services. Alaska Legal Services represented this Medicaid recipient, who was contesting the denial of Medicaid coverage and payment for routine dental services. Generally, Medicaid pays for routine dental care for children under age 21, but limits adult treatment to acute pain or infection. The recipient, a severely retarded and develop-mentally disabled adult, is incapable of describing dental problems and is resistant to having his teeth brushed. He claimed that Medicaid's denial of medically necessary dental services violates the federal Medicaid Act, the Equal Protection clauses of the U.S. Constitution and Alaska Constitution, and the Americans with Disabilities Act.

Judge Hopwood held that Alaska's Medicaid laws are consistent with federal law because Alaska Medicaid offers dental services to persons most in need, Alaska's Medicaid laws are rationally related to the legitimate state interest of targeting children for preventative dental care, and Alaska's Medicaid laws treat disabled and non-disabled people alike. Although Medicaid allows an undue hardship exception, it is reserved for the most extreme circumstances.

## Legislation/Regulations

### **IMPORTANT REGULATIONS LEGALLY REVIEWED**

During the month of July 2001, the Legislation and Regulations section legally reviewed and edited several important regulation projects. First, the section approved for filing the state recorder's regulations on UCC Article 9, secured transactions. These are important regulations that concern the filing of important UCC statements to perfect a security interest in certain property.

Second, the section worked with the Real Estate Commission on the commission's update of its regulations for the residential real property disclosure form. Since the form is issued in virtually every private sale of residential property, the regulation change impacts many Alaskans.

Other projects processed include regulations concerning joint title plant companies, election procedures, fees for occupational licenses, space guidelines for certain education facilities, Alcohol Beverage Control Board procedures, and special education programs.

## Special Litigation

### **DISMISSAL OF CASE AFFIRMED BY NINTH CIRCUIT**

The unusual federal court lawsuit alleging constitutional violations in an ongoing state court criminal proceeding, brought by Adam Bijan against his own public defenders, two state judges, a state prosecutor, and a state assistant attorney general, has concluded in the defendants' favor. Bijan alleged his public defenders were ineffective. He alleged

the judges made rulings in violation of his civil rights. He claimed that the prosecutor and assistant attorney general had engaged in malicious prosecution. Bijan sought \$400,000,000 in damages and injunctive relief. The Ninth Circuit affirmed dismissal of all claims, finding that Bijan essentially abandoned his appeal by failing to adequately brief the issues. The appellate court also acknowledged that federal courts must abstain from interfering with pending state court actions. The defendants were simultaneously represented by AAG Randy Olsen.

#### **SUPREME COURT REVERSES JURY VERDICT IN JAIL SUICIDE CASE**

Rudy Joseph was arrested in Nome in 1996. He was booked, searched, and placed in a holding cell that was equipped with a camera. A few hours later he strangled himself with a nylon cord from his sweatpants. His family sued the Department of Corrections, arguing that the DOC had a duty to protect him from himself because he was incapacitated from alcohol.

At trial the jury was instructed, following Alaska case law, that the plaintiffs could not recover if Rudy Joseph had intentionally committed suicide. The jury found that Mr. Joseph was not incapacitated and that his suicide was intentional, resulting in a defense verdict.

In an opinion issued July 13, the Supreme Court reversed, holding that the jury should have been allowed to determine whether the suicide, even if intentional, was foreseeable. The court held that DOC has a duty to prevent foreseeable suicides even by inmates who are not incapacitated by alcohol, drugs, or mental illness. The case has been remanded for a new trial with the additional jury instruction. The impact of the *Joseph* opinion may be considerable, with DOC potentially liable for any inmate suicide that a

jury finds was "foreseeable." Former AAG Ray Funk (now Judge Funk) did the jury trial; AAG Richard Keck handled the appeal and has the case on remand.

#### **STATE PREVAILS IN ROAD MAINTENANCE CASE**

The Anchorage Special Litigation section had some wins and some losses in the Supreme Court this month. In the success column, the Supreme Court affirmed the state's trial victory concerning claims of negligent road maintenance on the Parks Highway in the *Walden v. State* case. The court upheld the trial court's ruling on a host of evidentiary matters in this seven week trial, and affirmed the trial court's grant of summary judgment on a "signing" claim, finding that the use of the word "may" in the MUTCD (Manual on Uniform Traffic Control Devices) has the same effect as the use of "may" in statutes and regulations - which is permissive. Although the case involved a sanding issue, the claim was not that the state had failed to sand. Rather, the claim was that the sand used by the state was inadequate. The state was represented by the Delaney, Wiles law firm.

#### **FAVORABLE IMMUNITY DECISION OVERTURNED**

On the loss side, the Alaska Supreme Court issued its opinion on Friday, July 13th, in one of two cases on appeal involving the Miller's Reach Fire. The court reversed the trial court's grant of dismissal in *Anagnabooguk v. State*, finding that the state was not immune for all fire fighting decisions. The court also found that when the state's Division of Forestry took over the fire fighting operations, it assumed a duty to conduct the operations non-negligently. On the positive side, the court reaffirmed that the state has no actionable duty based upon internal guidelines or under general statutory grants of authority.

Because the appeal was from a motion to dismiss, the Supreme Court had to assume that the plaintiffs' factual allegations were true for purposes of their analysis of the case. On remand, these allegations will be examined to determine whether the actions complained of involved "planning" or "operational" decisions, and plaintiffs' factual allegations will be challenged. The case was handled at the trial court and briefed in the Supreme Court by AAGs Bill Morse and Robert Doehl; AAG Gary Guarino argued the case to the Supreme Court.

#### **SPLIT DECISION BY WORKERS' COMP BOARD REMANDED**

Also in the Alaska Supreme Court, a workers' compensation case was remanded back to the Alaska Workers' Compensation Board with instructions to refer the two-person split decision dismissing the employee's claim to a third member. If there is a decision favoring employer liability, then the board is to consider whether the employee's deliberate or negligent misuse of prescription drugs was a superceding cause of the employee's disability - which eliminates employer liability. The employee claimed that the stress of her employment caused her to become addicted to pain medication; the Supreme Court held that a statute barring injuries proximately caused by taking drugs not as prescribed was inapplicable to cases where the injury is addiction to the drug. The case is being handled by AAG Kristin Knudsen.

#### **PARTIAL SUMMARY JUDGMENT IN *STAHL V.* *STATE***

In the case of *Stahl v. State*, Judge Gonzalez granted partial summary judgment on the state's motion that it has discretionary immunity for claims that the state should have changed or upgraded the existing traffic control devices near the Alaska Zoo or that the state should have added a left turning lane. The remaining issues in the case are

set for jury trial in October. The case is being handled by AAG Gary Guarino.

### **Transportation**

#### **VALUATION ORDER RECEIVED IN NORTHGATE SQUARE CONDEMNATION**

A master conducted a hearing of the condemnation of a portion of Northgate Square, a Fairbanks shopping center. The master affirmed the Department of Transportation and Public Facilities' valuation of one parcel, and affirmed the department's valuation of the part taken from a second parcel. The master valued the damage to the remainder of the shopping center at \$250,000. Transportation has appealed this finding. AAG Tom Dillon represented DOTPF.

#### **CONDEMNATION HEARING HAS FAVORABLE OUTCOME**

AAG's Doug Gardner and Peter Putzier tried the condemnation case of *State v. Brusich* in Ketchikan Superior Court in front of the Hon. Michael Thompson during July. The state had previously deposited \$78,500 in the court in accordance with the appraised value of the approximately three acres of property taken from the Brusiches for construction of the Ward Lake Road in Ketchikan. Before trial, the state made a Rule 68 offer of \$140,000, which was rejected. The defendants argued to the jury that, by building the Ward Lake Road through the center of their 25-acre parcel of property, the state had destroyed the entire value of the property. The defendants asked the jury to award them \$1.5 million. After a week of trial, the jury returned a verdict early on Saturday morning awarding the defendants \$83,500. Since the defendants did not beat the state's offer of judgment or even the amount on deposit by more than 10 percent, the defendants are not



entitled to any attorney's fees from the time of the deposit in late 1995 through the trial. It is anticipated that the defendants will appeal.

#### **WORK ON DRYDOCK CLAIM UNDERWAY**

The entire Juneau Transportation section has been involved in the anticipated claim by Alaska Ship and Drydock (ASD) in Ketchikan for work performed on the refurbishment of the M/V Columbia. The design build refurbishment of the vessel's interior and repair of the switchboard following last summer's fire on the vessel required vessel delivery on May 26, 2001. Instead, the vessel was delivered by ASD to the Alaska Marine Highway System (AMHS) approximately a month late. Liquidated damages of approximately \$86,000 per day accrued, to exceed \$3 million dollars. AMHS and ASD plan on meeting in October to discuss resolution of the dispute; if no resolution is possible ASD will proceed through the formal claims process. AAG's Doug Gardner and Peter Putzier are representing AMHS on this matter. After the problems with performance on the Columbia contract, ASD said it was no longer able to secure commercial bonding for upcoming projects. In response, the Ketchikan Gateway Borough loaned ASD \$1 million to use as a cash bond to stay in business. AAG Bill Cummings has worked successfully with ASD, the Ketchikan Gateway Borough, and AMHS to arrange for the posting of cash performance and payment bonds to allow ASD to continue working on upcoming vessel maintenance projects this fall.

#### **PARTIAL SUMMARY JUDGMENT GRANTED IN "BOYSCOUTGATE"**

Superior Court Judge Weeks recently granted summary judgment to the state on two counts in what has become known as the "Boy Scout Camp Road" litigation near Eagle Beach in Juneau. William "Shorty" Tongard,

the recent purchaser of a large piece of property north of Juneau, placed a gate across what used to be an old forest service road on his property. Although the road has been used for over 80 years by the public and maintained by DOTPF, Tongard blocked the road on the theory that it had somehow reverted back to the property owner because it had not been maintained, etc. Ruling on the state's motion for summary judgment, the court dismissed Tongard's claim for inverse condemnation where the Herbert River Road (the road leading to the Boy Scout Camp Road) had been built outside the deeded right of way, and held that the state established an easement by prescription for that part of the road constructed on his property. Additionally, the court placed the evidentiary burden on Tongard to prove that the Boy Scout Camp Road right of way deeds had reverted. The case appears headed for trial on the reversion issue. AAG Peter Putzier is representing DOTPF.

### **CRIMINAL DIVISION**

#### **ANCHORAGE**

Russell Carlson pled no contest to murder in the second degree and DWI for the vehicular death of bicyclist Jessie Withrow. Carlson has six prior DWI convictions. Sentencing is scheduled for October 2001.

Ronald Frank was charged with four counts of contributing to the delinquency of a minor and one count of furnishing alcohol to a minor, which eventually led to the death of an Anchorage police officer. Frank provided alcohol to a group of underage teens, one of whom was 19-year-old Robert Esper. After the party, Esper eluded police and entered the highway at high speed. Officer Justin Wollam was killed in the line of duty when Esper crossed the median and collided head-

on with Wollam's vehicle. Esper and two of his teenage passengers also died.

Omelette Muasau was sentenced to 99 years in jail for murder in the first degree. Muasau and his co-defendant, Jeremy Palmer, robbed a Wendy's restaurant, where they had once been employed. Muasau shot and killed the manager, Dianne Rostron. Palmer was convicted of murder in the second degree, robbery in the first degree, and tampering with evidence; he was sentenced to 47 years in jail.

Antonio Garrison was indicted for the shooting death of an Anchorage car dealer. The car dealer's friends found him dead on his lot back in November 2000. Garrison also faces charges of robbery in the first degree, misconduct involving a weapon, two counts of tampering with evidence, theft in the first degree, and vehicle theft.

Four men were charged with kidnapping, robbery in the first degree, and burglary in the first degree. They robbed a man, whom they believed to be a drug dealer, at his home and kept him and his girlfriend captive there. The victim managed to trick the defendants into making a call to his bank, but telephoned police instead. When police responded to the house, the defendants took off their masks and fled in the victim's car. Eventually, the police caught the four men.

Jerry Taylor was indicted on charges of attempted murder, assault in the first degree, misconduct involving weapons in the second and third degree, and tampering with evidence. Taylor went over to his ex-girlfriend's apartment and met with her brother. The two men got into an argument and Taylor punched the victim and pulled out a gun. The victim fled to his apartment as Taylor started to shoot. One bullet went through the walls and came to rest six inches from an eight-year-old boy who was sleeping in his bed. Another bullet grazed the adult

victim's cheek. Taylor's criminal history includes four felony convictions in Alaska.

The adult defendant in the paintball case pled no contest to three consolidated counts of assault in the fourth degree. Each of the victims in the original seven counts was named in the consolidated counts. The presiding judge sought suggestions from the community regarding an appropriate sentence.

Carl Mercurief was arrested on charges of murder in the first degree for the shooting death of a Coast Guard officer in St. Paul. Mercurief entered an unlocked door of the Coast Guard facility where the officer was sleeping. He beat the officer with the butt of a gun. The confrontation moved to outside the facility, where Mercurief shot the officer multiple times. Mercurief then drove to his estranged wife's home and started to beat her. A man who was in the truck that Mercurief had driven to the Coast Guard facility and then to his wife's house managed to escape and call police. He had also been threatened by Mercurief not to talk about what he had heard and seen.

Gabriel Leon was arrested on a charge of murder in the first degree for a shooting death. Leon went over to his ex-girlfriend's house. Her ex-husband was spending the night and refused to leave. Leon returned to the house a short time later. The two men argued and Leon shot and killed the ex-husband. Leon fled. When he was later apprehended by police, he claimed he was defending himself.

Correction to June 2001 entry regarding Bret Maness: The troopers believed that Maness fired at them, but those potential charges are still under investigation and are not yet charged.

## **BARROW**

The grand jury returned indictments against a Barrow man for sexual abuse of a minor, and against another defendant for assaulting his girlfriend with large pliers and biting her. A local woman was indicted for trying to stab her son because she believed him to be the devil.

The Barrow DAO was moved to the new court building along with all the other state offices.

## **BETHEL**

John Worm was found not guilty of assault in the fourth degree (DV) after a jury trial. Trial rulings by Judge Murphy contributed to the verdict. The judge excluded evidence of domestic violence from 1993 and 1994 as being too remote. He also allowed evidence that the victim was on probation with a condition not to drink to be brought out to show bias even though there was no information in the police report that she had been drinking.

James Brink was sentenced to ten years in jail with five years suspended for misconduct involving weapons in the first degree and a concurrent three-year flat sentence for assault in the third degree for shooting from a vehicle into a Bethel police sergeant's residence. The bullets narrowly missed the sergeant's wife and baby, who were sleeping.

## **CORRECTIONS**

The Alaska Supreme Court, in *Brandon v. Corrections Corp. of America, et al.*, [Opin. No. 5438 - July 27, 2001], upheld the constitutionality of part of Alaska's Prison Litigation Reform Act (APLRA) dealing with filing fees for prisoners suing the state or state officials for their treatment while incarcerated. The court held that the requirement in AS 09.19.010 that inmates

suing the state pay at least a partial filing fee does not violate the rights of inmates' access to the courts and serves a legitimate state interest of deterring frivolous inmate litigation.

Judge Andrews issued an order detailing her reasons for upholding the constitutionality of Alaska's PLRA (Prison Litigation Reform Act), in the *Cleary* case.

## **FAIRBANKS**

Darren Nathaniel was sentenced to 30 years with 10 years suspended on his plea to second-degree murder for his role in the felony murder of a Nenana trapper. Nathaniel wasn't the killer and turned himself in after the murder and cooperated with the police to apprehend the killer.

Serial child molester Mathew Pease was indicted for the sexual molestation of eight Russian boys over a three-month period in Delta Junction.

Annie Ketzler, while fleeing from an accident scene where she nearly ran over a pedestrian after striking another vehicle, lost control of her car and ran off the embankment into the Chena River. Her infant child was abandoned underwater in a car seat and was saved from drowning by the heroic efforts of two troopers who dived under water to rescue the child. Ketzler was driving with a 0.20% BAC and was indicted for assault in the first- and third-degree for injuries to the child and nearly running over a pedestrian.

The court system moved into the new Rabinowitz Courthouse, leaving the Fairbanks District Attorney's Office as sole tenant of the old courthouse.

## **JUNEAU**

Christopher Reese was charged with robbery in the second-degree for demanding money

from a tourist. The tourist left an e-mail address and phone number, but never responded to our attempts to contact him. The case was dismissed and Reese was released. Seven hours later, however, Reese was back in custody for a home invasion burglary with three other individuals.

Colin Soutar was in a somewhat similar situation. He was a crewmember from the cruise ship *Mercury* who struck a crewmember from the *Radiance of the Seas* during a soccer game, breaking the orbit around the second crew member's eye. There were several witnesses, but all were cruise ship crewmembers. Again, at the time of the grand jury proceedings no witnesses could be located. The case was dismissed, but the Immigration and Naturalization Service required that the cruise ship line for which Soutar worked remove him from the United States.

George Miyasato, who has a sexual abuse of a minor trial set for August, was indicted for interfering with an official proceeding. When he was on release to the Public Defender Agency as a third-party sight-and-sound custodian, he telephoned the mother of the victims in the pending sexual abuse case and threatened her.

Several people were indicted for low-level drug dealing.

## **KETCHIKAN**

Patrick Cook was sentenced to 99 years in jail for murder in the first degree. In December 1999, Cook went with his friend, Harold Trout, to Trout's room to sleep off their night of drinking. While there, Cook cut Trout's throat with a knife, stabbed both his eyes, cut other parts of his body, bit off part of Trout's nose and ear, and tried to bit his neck. Cook had several prior felony convictions, including several felony and misdemeanor assault convictions.

The second homicide of 2001 occurred when Manuel Ortega attacked his friend and roommate. Ortega woke his friend in the early morning and assaulted him. Ortega slammed the victim's head into a post. The victim died of heart problems. Ortega has been indicted for murder in the second degree.

Ketchikan's third homicide of the year occurred when Joshua Anderson and Terry Simpson killed Steve Perry in the course of a robbery. Anderson and Simpson met Perry in a restaurant early in the morning. They told a friend that they planned to beat him up and take his money. A few hours later, the friend was walking home and found Perry's body in front of a local attorney's office. He told the police about Anderson and Simpson. The police located them. They both admitted to punching Perry in the face as he was walking up the stairs, which caused Perry to fall backwards on the concrete stairs and hit the back of his head hard on the concrete. They then took his money. Perry died of head injuries. They have been indicted for murder in the second degree (felony murder), manslaughter, robbery in the first degree, and theft in the second degree.

Byron Peters was convicted by a Craig jury of felony DWI and DWLR. He was stopped driving and had a 0.140 BAC.

Two young Ketchikan men were indicted for burglary for breaking into the mortuary and stealing cigarettes. A Craig man was indicted for assault in the second degree for knocking his girlfriend to the ground during an argument and pounding his foot into her face, which broke her jaw in several places on both sides. Others were indicted for sexual abuse of minor, burglary, assault, and failure to appear.

## **KODIAK**

A Palmer man had his summer commercial fishing schedule disrupted when he was arrested and convicted of first-degree vehicle theft and felony driving while intoxicated. The man, who already had a Palmer arrest warrant outstanding for a prior felony DWI, was sentenced to five years with two years suspended and placed on probation for seven years following his term of incarceration.

A man from the village of Old Harbor, who a jury convicted of first degree assault in April, was sentenced to the maximum twenty years in prison, with three of those years being suspended, for biting off the nose of another man in an unprovoked attack last September. He also had a total of 2 years, 110 days imposed on petitions to revoke probation on three prior misdemeanor assaults cases.

A Kodiak woman was sentenced to serve six months in jail, and placed on probation for five years, following her conviction for misconduct involving a controlled substance in the third degree. Carrying on the family business while her husband was incarcerated for misconduct involving a controlled substance, the woman delivered cocaine to an undercover operative working in association with the narcotics unit of the Kodiak Police Department and the Alaska State Troopers.

An Anchorage woman was sentenced to nine months in jail and placed on probation for five years following her conviction for misconduct involving a controlled substance in the third degree. In addition, the woman was ordered to forfeit \$7,464 that was found in her possession when she was arrested following the sale of cocaine to an undercover operative.

The Kodiak grand jury indicted a Kodiak man for attempted first degree murder

(unclassified felony) and assault in the third degree (class C felony) for the June beating and stabbing of Kodiak Police Sergeant Terry Ash. He was also charged with felon in possession of a concealable firearm (class C felony). A co-defendant, who remains at large, was also indicted for assault in the first degree (class A felony) and assault in the second degree (class B felony) for his participation in the beating and stabbing of Sgt. Ash.

## **KOTZEBUE**

Ros Lockwood instituted a pre-indictment process in Kotzebue that is proving to be a success. The number of cases taken to grand jury has sharply declined and the time for case resolutions has decreased. Nevertheless, new cases continue to swarm in. Point Hope resident Ned Webber was charged with two counts of felony assault as well as failure to stop. Monty Ferguson similarly faces new felony assault charges. Paula Smalley, who has prior convictions for selling drugs and alcohol, has been charged with a drug offense. Two new felony DWI's were charged as well: George Stalker and Marvin Kagoona.

## **NOME**

Two individuals in Nome were charged with a series of forgeries; the proceeds of the forgeries apparently funded cocaine purchases. One of the defendants in that case, in an effort to minimize his own legal difficulties, offered to make some drug buys for the police. This month, four people were charged with selling to the informant in a series of recorded buys. Charged were Dawn Cross, Jayme Sobocienski, John Gould, and Anna Gould. Cross had 72 grams of cocaine in her possession at the time of her arrest.

Daniel Bouchan was arrested on a felony assault charge after he pointed a rifle at a village police officer who had stopped to ask

him not to be shooting in the village at 5 a.m. In Unalakleet, Vincent Eakon was arrested and charged with a sexual assault in which the victim had apparently been beaten with a two-by-four. Other new felonies include sexual abuse of minors charges against Roger Kunayak and Bobby Ahkinga. Eric Katchatag pled out to a second offense DWI on the eve of trial.

July was a very busy month with new case intakes running at almost double the usual rate. The volume of misdemeanor probation revocations was also up significantly. John Earthman attended an NDAA trial advocacy course in South Carolina and reports that the program was very beneficial.

### **SITKA**

A jury in Kake acquitted the defendant on two counts of fourth-degree assault against two of his former friends whom he beat up after a night of drinking. At trial, he claimed self-defense for the first time.

The grand jury indicted on charges of burglary and assault in the second-degree. The defendant had tried to enter one of the fishery bunkhouse rooms with a knife, while threatening to kill the occupants. It took several of the bunkhouse residents to ward him off and eventually get the knife away.

Probably the most interesting grand jury case was a charge of second-degree assault against a local bed and breakfast owner. The defendant has motion-sensor cameras set up all over his property, along with multiple video monitors so he can watch the property at all times. One of the monitors is in his living room, another in the bathroom. Yet another is in the guest kitchen area, where one of the guests, a college student in his early twenties, had a small dinner party. After dinner his friend stepped outside for fresh air and, not realizing anyone could see but his other friends near the monitor in the kitchen,

moonied the camera. The defendant ran outside screaming and swearing. The young man apologized repeatedly and agreed to leave immediately, but, still enraged, the owner picked up a long-handled metal shovel and whacked him on the head, knocking him down. The defendant told the young man he was lucky that's all he did. The defendant wanted the police to pursue harassment charges against the young man because he was offended when he saw the "moonie" while watching the monitor in his living room.

The office has a new law office assistant. Karen Mann hit the ground running and is catching up on the backlog.

### **OSPA**

Office of Special Prosecutions & Appeals

### **Personnel News**

Denise Greger, the secretary to the special prosecutions unit, resigned to accept a position with the Municipality of Anchorage.

### **Prosecution News**

*Kesler sentenced for misapplication of property.* Anthony Kesler was sentenced on one felony count of misapplication of property. Barrow Superior Court Judge Michael Jeffery suspended imposition of sentence and placed Kesler on probation for three years. As conditions of his suspended sentence, Kesler will be required to spend 60 days in jail, perform 200 hours of community work service, and pay restitution of \$15,000. Kesler's prosecution arose from the investigation of the "Nuvuk Democratic Club." Kesler and Patrick Cimino had obtained a charitable gaming permit for the Nuvuk Democratic Club, and then had misused the permit for personal profit.

## Petitions & Briefs of Interest

### **Briefs of Interest**

*Character evidence – evidence of victim’s peacefulness.* The state argues that evidence of the victim’s character for peacefulness may be introduced under Alaska Evidence Rule 404(a)(2) to rebut evidence that the victim was the first aggressor even if the defendant argues heat of passion rather than self-defense at trial. *Earl v. State*, No. A-7385.

*Custodial interference – intent to hold child for “protracted period.”* The state argues that a defendant charged with custodial interference may not introduce evidence of his reasons for abducting the child for the purpose of showing that, given these reasons, the length of the detention was not “unreasonably” protracted. *Perrin v. State*, No. A-7696.

*Due process – request for defense immunity.* The state argues that a prosecutor was not required to grant transactional immunity to the victim of a domestic violence assault who had perjured herself at grand jury and who intended to perjure herself again at trial. The victim had invoked the privilege against self-incrimination, and the defendant had argued that he could not obtain a fair trial unless she testified under a grant of immunity. *Ward v. State*, No. A-7748.

## Court Decisions of Note - Alaska

*Cross-examination – necessity of prior application.* A prior application to the court is necessary before an attorney may inquire into evidence concerning whether a witness

has engaged in criminal conduct. In this case, the prosecutor violated this rule when, without making a prior application, the prosecutor inquired of a defense expert whether he had ever been accused of sexual abuse. *David v. State*, Op. No. 1752 (Alaska Court of Appeals, 7/13/01).

*Cross-examination – good-faith basis for posing question.* An unverified hearsay report by a state paralegal that a defense expert had been accused by his son of sexual abuse was not sufficient to provide a good-faith basis for cross-examining the defense expert about this accusation. The requirement of a “good-faith basis” can be satisfied only by admissible evidence. *David v. State*, Op. No. 1752 (Alaska Court of Appeals, 7/13/01).

*Evidentiary privilege – adverse inference from assertion of privilege.* When a witness initially asserts an evidentiary privilege in response to a question, then relents and agrees to answer the question, the witness’s initial refusal to answer the question ordinarily will provide no basis for inferring that the witness has something to hide. Thus, in this case, the trial judge erred by permitting the jury to hear that a defense expert initially had asserted the psychotherapist-patient privilege in response to questions about information disclosed by his son during psychotherapy. *David v. State*, Op. No. 1752 (Alaska Court of Appeals, 7/13/01).

*Psychotherapist- patient privilege – who may assert.* A defense expert who was questioned about information disclosed by his son during psychotherapy could validly assert his son’s psychotherapist-patient privilege in response to the questions. *David v. State*, Op. No. 1752 (Alaska Court of Appeals, 7/13/01).

*Post-conviction relief – affidavit from attorney.* When a defendant files a *pro se* application for post-conviction relief asserting that his

trial attorney was ineffective, but makes only a perfunctory effort to obtain the required affidavit from his trial attorney, the trial court sometimes will be required to obtain the affidavit for itself. In this case, the defendant wrote a letter requesting an affidavit, and then mailed copies of the letter to the court and the district attorney. (The defendant may or may not have actually sent the letter to his trial attorney.) The district attorney moved to dismiss the application on the ground that the defendant had never supplied an affidavit from his trial attorney. The trial court eventually dismissed the application on this basis, but the court of appeals said that the trial court should have undertaken to obtain the trial attorney's affidavit for itself rather than dismissing the action. *Linton v. State*, Op. No. 1753 (Alaska Court of Appeals, 7/20/01).

*Equal protection – bail pending appeal.* AS 12.30.040(b)(2) is unconstitutional insofar as it denies bail pending appeal to a defendant whose current conviction is for a class B or C felony and who has a prior conviction for a sex offense or first-degree stalking. The court of appeals concluded that the statute is irrational because it denies bail to repeat felons whose *prior* convictions include a sex offense but doesn't deny bail to repeat felons whose *current* conviction is for a sex offense. *Bourdon v. State*, Op. No. 1754 (Alaska Court of Appeals, 7/20/01).

*Marijuana offenses – meaning of "plant."* As used in AS 11.71.040(a)(3), which makes it a felony to possess "25 or more plants of the genus cannabis," the word "plant" refers only to live plants. Thus, in this case the judge erred when she instructed the jury that "it does not matter whether the plant is alive or dead." The error was not harmless since the evidence showed that the defendant had possessed 19 live plants and 33 pots containing the dead remnants of previously harvested marijuana plants. In reversing the defendant's conviction, the court of appeals

acknowledged that dead plants are circumstantial evidence that, at one point, the defendant possessed these plants when they were alive. Thus, in some circumstances dead plants might form the evidentiary basis for a determination that the defendant, at some specific point in the past, actually possessed 25 live plants. *Pease v. State*, Op. No. 1755 (Alaska Court of Appeals, 7/20/01).

*Drunk driving – right to independent test – state action.* Under some circumstances, police officers may be under a duty to correct, or at least disavow, misinformation provided to a suspect by private individuals. In this case, a defendant who was arrested for drunk driving, and who requested an independent blood test, withdrew his request for the test after being told by the hospital's receptionist that his test result would not be admissible in court. The court of appeals held that the defendant will be entitled to suppression of the breath test result if the trial court finds on remand that the defendant acted reasonably in interpreting the "ambiguous" conduct of the officer who accompanied him to the hospital as a confirmation that the blood test would not be admissible in court. *Hernandez v. State*, Op. No. 1756 (Alaska Court of Appeals, 7/20/01).

*Jury selection – preemptive exclusion for cause.* A trial court erred by deleting the names of several prospective jurors from the jury list on the basis of the state's "blanket preemption" of all jurors who had been charged with crimes. As a general rule, individualized questioning of the prospective jurors must precede a disqualification for cause. In this case, the trial court apparently had used an APSIN printout to identify jurors who had been charged with crimes. The Supreme Court said that individualized questioning might have revealed inaccuracies in the APSIN records. *Joseph v. State*, Op. No. 5432 (Alaska Supreme Court, 7/13/01).



*Use of precedent.* An appellate decision will not be treated as binding precedent “if its holding is only implicit or assumed.” *Joseph v. State*, Op. No. 5432 (Alaska Supreme Court, 7/13/01).

*Cost of appointed counsel – exception for successful appeal.* Only defendants who succeed in having their convictions reversed are exempt from paying part of the cost of their appointed attorney under Alaska Appellate Rule 209(b)(5). The exemption does not apply to a defendant who prevails on appeal, but whose appeal does not include a challenge to his conviction. In this case, for example, the defendant attacked the trial court’s restitution order and the trial court’s refusal to strike certain information from the presentence report. Though he prevailed on both issues, the court of appeals still held that he was liable for the cost of his appointed attorney under Appellate Rule 209. *Malutin v. State*, Op. No. 1757 (Alaska Court of Appeals, 7/27/01).

*Sentencing – first-degree weapons misconduct.* The presumptive term for a first-felony offender convicted of first-degree weapons misconduct under AS 11.61.190(a)(2) is five years, rather than seven years, despite the fact that the offense necessarily involves the use of a dangerous instrument. Under AS 12.55.125(c)(2)(A), a first-felony offender convicted of a class A felony other than manslaughter is subject to a presumptive seven-year term if he “possessed a firearm [or] used a dangerous instrument.” Discharging a weapon from a moving vehicle under circumstances “manifesting a substantial and unjustifiable risk of physical injury to a person or damage to property” is a class A felony (first-degree weapons misconduct) under AS 11.61.190(a)(2). But the court of appeals concluded that it wouldn’t make sense to impose the seven-year presumptive term on a person convicted under this section, since a person who shoots and kills someone from a

moving vehicle is, by comparison, subject only to a five-year presumptive sentence for manslaughter. *Smith v. State*, Op. No. 1758 (Alaska Court of Appeals, 7/27/01).

*Post-conviction relief – filing fees.* The statute requiring indigent prisoners to pay full or partial filing fees before commencing civil litigation against the state, AS 9.19.010, does not violate the equal protection clause. In this case, the prisoner argued that the statute unconstitutionally discriminates between prisoners and indigent non-prisoners, who may be wholly exempt from paying filing fees. The Supreme Court concluded that prisoners and non-prisoners are not similarly situated. The court also concluded that the statute’s purposes – among them the purpose of discouraging frivolous, recreational litigation by prisoners – are legitimate. *Brandon v. State*, Op. No. 5438 (Alaska Supreme Court, 7/27/01).